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No. 09-723

IN THE
Supreme Court of the United States

AURELIUS CAPITAL PARTNERS LP, *et al.*,

Petitioners,

v.

THE REPUBLIC OF ARGENTINA,
ARAUCA BIT AFJP S.A., *et al.*,
ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ADMINISTRACIÓN NACIONAL DE SEGURIDAD SOCIAL

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STATUTORY PROVISIONS INVOLVED

Section 1609 of the Foreign Sovereign Immunities Act of 1976 (the "FSIA") provides

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [Oct. 21, 1976] the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter."

28 U.S.C. § 1609.

Section 1610(a) of the FSIA authorizes execution against property of a foreign state located in the United States only if the property is "used for a commercial activity in the United States," even if the foreign sovereign has waived its immunity. 28 U.S.C. § 1610(a).

Section 1610(b) of the FSIA states that the property of an "agency or instrumentality of a foreign state engaged in commercial activity in the United States" may be attached only in certain specific circumstances (*e.g.*, if the "agency or instrumentality" has "waived" immunity from execution). 28 U.S.C. § 1610(b).

Section 1603(b) of the FSIA defines "agency or instrumentality of a foreign state" as

> any entity–

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 U.S.C. §§ 1332(c) and (e)] nor created under the laws of any third country.

28 U.S.C. § 1603(b).

STATEMENT OF THE CASE

Petitioners – a Cayman Islands vulture fund and its Delaware affiliates – seek to have this Court review the judgment of the United States Court of Appeals for the Second Circuit[1] vacating a December 11, 2008 order of the United States District Court for the Southern District of New York (the "December 11, 2008 Order," and, together with the other orders appealed from below, the "Orders") obtained to enforce judgments against the sovereign Republic of Argentina (the "Republic").

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1. Justice Sotomayor presided over oral argument in the Second Circuit, but was appointed to this Court in August of 2009, before the decision was issued. The two remaining panel members, Judges Walker and Wallace, being in agreement, determined the matter. *See* Appendix to Petition ("Pet. App.") at 4a.

Although this case is one of the latest in a series of attempts by holders of Argentine sovereign bonds to enforce judgments against the Republic, the Orders are unique in that, had they been upheld, they would have transferred money from Argentine retirees and workers and into the pockets of the offshore, private funds that purchased Argentine sovereign bonds at a deep discount.

Respondent Administración Nacional de Seguridad Social ("ANSES") is an autonomous statutory agency created under Argentine law, responsible for administering Argentina's social security system. ANSES was not named as a party to the proceedings below, never issued any bonds, has not waived sovereign immunity and has appeared in this proceeding on a special, limited basis to oppose the Orders, which purported to freeze "ANSES Property."[2]

Until late 2008, Argentina's mandatory pension system was a mixed arrangement, with ANSES administering certain of the pension contributions made by Argentine workers, and private managers administering other such funds. Under Argentine law, both ANSES and the private managers were subject to strict legal constraints on the manner in which they managed these assets, including that the investments under their control could only be invested and applied to pay for social security benefits.

2. The Second Circuit held that ANSES had standing to appeal the Orders as an "interested non-party," as they placed ANSES property "at stake." Pet. App. at 14a. Petitioners do not contest this ruling and have named ANSES as a respondent to the Petition. Pet. at vii.

On October 21, 2008, Argentina's government announced that this system would be unified under ANSES's overall management. Under these announced reforms, which at that time were not yet law, the private managers would be required to repatriate in kind to Argentina all investments held abroad so that they could be managed by ANSES.

On October 29, 2008, galvanized by these announced reforms, Petitioners successfully moved before the district court for orders freezing any Argentine social security funds in the United States, resulting in the freezing of approximately $200 million of Argentine workers' funds. Petitioners claimed that these funds should be made available to them in satisfaction of the Republic's debts.

On December 9, 2008, a law went into effect unifying the Argentine national pension system and requiring that all pension resources then administered by private managers be absorbed into a "Guarantee Fund" located in Argentina and administered by ANSES. This law, however, remains unimplemented as regards Argentine workers' social security funds located in the United States, because these funds were frozen in place by the attachments and restraints issued by the district court before the law was enacted.

Two days after the Argentine law went into effect, the district court issued its December 11, 2008 Order, holding that Argentine workers' social security funds located in the United States could be executed and made available to the Republic's judgment creditors, including Petitioners. Over objections by ANSES and

the Republic, the district court held that these funds fell within the execution exception to sovereign immunity because, (1) ANSES and the Republic were legally indistinguishable; and (2) the funds were "used for commercial activity" in the United States for purposes of 28 U.S.C. § 1610(a)(1).

Reversing, the court of appeals held that the funds were not subject to attachment because neither ANSES nor the Republic had "used" them for a "commercial activity" in the United States for purposes of § 1610(a)(1) of the FSIA. The only "use" to which the funds had been put was that an Argentine statute had transferred "legal control" of the funds from the private managers to ANSES. This, the Second Circuit held, was a sovereign act, not a commercial use of the funds. There being no other use to which these funds had been put by ANSES or the Republic, the December 11, 2008 Order was invalid by virtue of § 1609 of the FSIA. All the Orders were therefore vacated. This dispositive holding made it unnecessary for the Second Circuit to consider the numerous other grounds advanced by ANSES and the Republic for vacating the Orders, including ANSES's argument that its property, let alone property it merely managed for others, was separate from that of the Republic and therefore not available to be attached in satisfaction of the Republic's debts under well-established FSIA authority.

The Second Circuit's decision is grounded on unique fact-based determinations of no significance beyond the particular circumstances in this case. This, combined with the absence of any conflict between the Second Circuit's decision and this Court's jurisprudence, as well as the absence of a circuit split, makes this case inappropriate for certiorari review.

A. The 1991 Decree Establishing ANSES as the National Entity Responsible for Administering the Unified Argentine Social Security System

ANSES is the Argentine Social Security Administration statutorily responsible for administering the mandatory pension contributions of Argentine workers and distributing retirement, disability, survivor and similar benefits to social security beneficiaries. Pet. App. at 6a.[3] Under its 1991 founding decree, ANSES is an "*entidad autárquica*," "a 'decentralized entity'" that operates under "'the jurisdiction of the Ministry of Labor and Social Security.'" Pet. App. at 33a (quoting Argentine Decree No. 2741/1991, Dec. 26, 1991 (hereinafter "1991 Decree"), art. 1). ANSES "has the power to manage its own administration and finance, independent of the [Argentine] national treasury." *Id.* at 33a-34a (quoting 1991 Decree, art. 3). Moreover, "[u]nder Argentine law, ANSES may enter into contracts, sue and be sued, and acquire assets in its own name." *Id.* at 34a. Under Argentine law, therefore, ANSES possesses its own juridical existence, separate from the Republic.

ANSES-managed funds are effectively held in trust for social security beneficiaries. "Argentine law . . . provides that ANSES assets cannot be attached and can only be used for payments to beneficiaries." *Id.*

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3. The Argentine constitution guarantees that the government shall "provide social security benefits to its citizens." Pet. App. at 6a. Article 14*bis* of the Argentine Constitution states that "'[t]he State shall grant the benefits of social security, which shall be of an integral nature and may not be waived.'" *Id.*

B. The 1993 Reforms Create a Mixed Pension Arrangement, Authorizing Private Managers (AFJPs) to Administer Argentine Pensioners' Funds

At the time of ANSES's establishment in 1991, Argentina had a "unified social security system, known as the 'Distribution System.'" *Id.* at 6a. In 1993, Argentina reformed its pension system "to create a hybrid regime that allowed Argentine workers and pensioners to choose between the Distribution System and a new private plan, the 'Capitalization System.'" *Id.* Under the Capitalization System, workers could contribute to accounts managed by private fund managers called *Administradoras Fondos de Jubilaciones y Pensiones* ("AFJPs"). *Id.* at 6a, 33a. The AFJPs comprised the "private" management aspect of Argentina's then-existing hybrid social security system.

Like ANSES, the AFJPs were trustees, in that "[b]y law, the assets in the [AFJP-administered] funds were only to be used to provide social security benefits, and the [AFJPs] did not have property rights in the funds' assets." *Id.* at 6a. Specifically, "[t]he law provided that these assets could be used only to generate social security benefits, did not belong to the AFJP, and were not subject to attachment." *Id.* at 35a (citing Law No. 24,241, Oct. 13, 1993, art. 82).

Some of the AFJP-managed funds were invested in the United States, "where the [AFJPs] invested the funds to grow for the benefit of the pensioners." *Id.* at 6a. Thus, the record is clear that *all* the funds at issue in this case came from mandatory contributions of Argentine social security beneficiaries, and, under Argentine law, could be applied only to the payment of Argentine social security benefits.

C. The Establishment in 2007 of the "Guarantee Fund"

In 2007, "[d]issatisfied with the Capitalization System," Argentina's legislature passed a law authorizing the holders of private accounts (administered by the AFJPs) "to switch back to the Distribution System." *Id.* "In order to facilitate this transition, the Argentine Congress passed a decree establishing the Sustainability Guarantee Fund (Guarantee Fund), which received the social security funds transferred from the Capitalization System and was managed by [ANSES]." *Id* at 6a-7a. Located in Argentina, the Guarantee Fund "is funded by the assets of workers who moved from the private pension system to the public system, as well as ANSES budget surpluses and investment returns." *Id.* at 34a.

Reinforcing that it is essentially trust property, the Guarantee Fund, like other social security funds administered by ANSES and the AFJPs, may only be invested in a manner that satisfies the "criteria of 'safety and profitability'" established by a statutory management committee. *Id.* (citing Decree No. 897/2007, July 12, 2007, art. 8). And, again reflecting its trust status, "[t]he law establishing the Guarantee Fund provided that its assets could be used only to provide social security benefits to qualifying participants." *Id.* at 7a.

D. The Argentine Government's October 2008 Announcement that the National Pension System Will be Reunified

On October 21, 2008, the Argentine government proposed legislation "requiring the reunification of the bifurcated social security system." *Id.* Under this proposal, which effectively restored the administration of social security resources to their pre-1993 arrangements, all the assets in the Capitalization System (*i.e.*, all monies administered by the AFJPs) would be required to be transferred to the Guarantee Fund under ANSES's management in Argentina. *Id.* The proposed legislation also reaffirmed that assets in the Guarantee Fund may only be used to provide social security benefits for Argentine workers and pensioners. *Id.*

At the time of this legislative proposal, certain Argentine pension funds were being administered by AFJPs through accounts located in the United States. *Id.* at 7a. Although these pensioner monies were potentially subject to the Argentine government's (proposed but not yet enacted) reforms, they were, at this time, entirely in the hands of the AFJPs, which themselves were, in the words of the Second Circuit, "*indisputably private entities.*" *Id.* at 10a-11a (emphasis added).

E. The October 2008 Restraints and the Embroiling of ANSES in This Litigation

On October 29, 2008, Petitioners successfully moved the United States District Court for the Southern District of New York for emergency orders restraining all Argentine social security assets said to be located in the United States and managed by AFJPs, defined by Petitioners as including all so-called "ANSES Property" in the United States. *Id.* at 81a. Petitioners posited the theory that the proposed legislation, if passed, would effect a transfer of the AFJP-managed funds *to the Republic itself*, for the Republic's own purposes, and, therefore, would render the funds susceptible to execution in satisfaction of the Republic's debts, *see id.* at 8a – thus enabling pensioners' money to flow directly into Petitioners' pockets.

This application resulted in the freezing of some $200 million of Argentine pensioners' monies ("the Funds") based entirely on Petitioners' theory that, although in the hands of "indisputably private entities," they should nonetheless be treated as "ANSES Property," and, by extension, the Republic's property. *Id.* at 8a, 32a, 81a.

Shortly thereafter, numerous other judgment creditors of the Republic – including the vulture funds EM Ltd. ("EM"), NML Capital, Ltd. ("NML") and GMO Emerging Markets L.P. ("GMO") – obtained further orders, including pre- and post-judgment attachments over "ANSES Property" that invoked 28 U.S.C. § 1610, and sought (and were later issued) "Writs of Execution" over the Funds. *Id.* at 8a.

ANSES, although not a party,[4] immediately sought to vacate these orders to the extent that they affected or could affect "ANSES Property." ANSES presented undisputed evidence showing that it was legally separate from the Republic and further demonstrating that ANSES itself did not have or hold any property in the United States. *Id.* at 36a, 44a. On November 14, 2008, rejecting ANSES's application, the district court continued its various measures freezing the Funds.

On November 24, 2008, the district court entertained yet another set of applications, this time from EM and NML. Citing the expected imminent passage of the Argentine pension reform legislation, EM and NML sought and were granted new attachment orders and a restraining order directed, in part, against ANSES, effective immediately upon the new law taking effect. *Id.* at 20a; Br. for NML and EM in Support of the Petition ("EM/NML Br.") at 6 n.2.

F. The December 9, 2008 Pension Unification Law Required the Funds to be Repatriated to Argentina so That ANSES Could Administer Them There

On November 20, 2008, the Argentine Legislature passed Law 26,425 (the "Pension Unification Law"), which came into effect on December 9, 2008. Pet. App.

4. Though Petitioners purported to restrain "ANSES Property," they never served ANSES with process in the proceedings below; nor was ANSES ever named as a defendant in the underlying suits on the sovereign bonds or in the prior proceedings below to enforce the judgments. ANSES's objections to these procedural shortcomings, which independently justified vacating the Orders, were mooted once the Orders were vacated on other grounds.

at 9a-10a. Entitled "Public Social Security System, Unification," the new law eliminated the private management component of the social security system, and restored the ANSES-managed regime that had existed before private management had been allowed to co-exist with ANSES's management in 1993. *Id.* at 10a, 89a.

The Pension Unification Law "mandat[ed] that the majority of the funds previously administered by the [AFJPs] be transferred in kind to the Guarantee Fund administered by [ANSES] in Argentina." *Id.* at 9a-10a. Consistent with previous legislation regulating the prudential criteria for the management of Argentine pensioners' funds, the law provides that "the assets of the funds shall be invested 'by applying criteria of sufficient security and profitability while contributing to the sustainable development of the real economy.'" *Id.* at 10a (quoting Pension Unification Law, art. 8). The law further stated "that '[t]he total amount of the funds may only be employed to make payments in the Argentine Integrated Pension System,'" *id.* (quoting Pension Unification Law, art. 8) (alteration in original), and "that social security funds managed by [ANSES] may be invested only in Argentine securities." *Id.*

Effectively, therefore, the Pension Unification Law required that any AFJP funds be repatriated to Argentina. Only if located in Argentina could they be placed under ANSES's management. *Id.* Only upon repatriation could they be invested by ANSES in conformity with the new law, *i.e.*, "only in Argentine securities." *Id.* Nevertheless, because of the Orders freezing and attaching these funds as at December 9,

2008, some of which dated back to October of 2008 and some of which became "effective immediately upon the passage of [the Pension Unification Law]," *id.* at 20a, these critical elements of the law were not "implemented." *Id.* at 11a.

G. The December 11, 2008 Order

Two days later, by its December 11, 2008 Order, the district court confirmed the prior Orders and granted Petitioners' (and other bondholders') motions for writs of execution over the Funds. *Id.* at 10a-11a, 23a-58a.

In its opinion, the district court held that, notwithstanding ANSES's unchallenged legal separateness from the Republic, the Funds were the property of the *Republic* itself, because, in the district court's view, ANSES and the Republic were indistinguishable. *Id.* at 49a.[5] Upon this premise, the

5. Before the Second Circuit, ANSES demonstrated it was legally separate from the Republic under Argentine law and therefore an "agency or instrumentality" of a foreign state under §§ 1603(b) and 1610(b) of the FSIA. Therefore, under this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 624-26, 633-34 (1983) ("*Bancec*"), ANSES's property was separate from that of the Republic, and could not be attached in satisfaction of the Republic's debts. ANSES also argued that the maintenance of investments for the purpose of funding social security payments is a quintessentially *governmental*, non-commercial activity, thus rendering the Funds immune from execution under either §§ 1610(a) or 1610(b), *see* Pet. App. at 21a-22a. The Second Circuit found it unnecessary to reach these arguments, given the narrow fact-based ground on which it vacated the Orders. *See* Pet. App. at 21a-22a.

district court held that the Funds were excluded from sovereign immunity because they were being "used for a commercial activity in the United States" for purposes of § 1610(a) of the FSIA, as they had been used "in the hope of profit" while under the administration of the private AFJPs. *Id.* at 53a.

During the pendency of ANSES's appeals, enforcement of the Orders was suspended. *Id.* at 11a. Meanwhile, because the Orders had "'froze[n]'" the AFJPs' funds in the United States, ANSES "[was] unable to take possession of the funds, and the new law transferring the funds to [ANSES] [was not] implemented." *Id.*

H. The Second Circuit Vacates the Orders

On October 15, 2009, a panel of the Second Circuit unanimously held that each of the district court's restraints should be vacated.

The Second Circuit began by noting the accepted principle that, as set forth in § 1609 of the FSIA, foreign state property is generally immune from execution, unless the property "fits within one of the limited exceptions enumerated in section 1610 or 1611 of the [FSIA]." *Id.* at 17a. For property to be subject to attachment and execution under 28 U.S.C. § 1610, it "must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued." Pet. App. at 18a (quoting 28 U.S.C. § 1610(a)). These "statutory criteria," it stressed, remain essential "'[e]ven when a foreign state completely waives its

immunity from execution.'" *Id.* (quoting *Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 247 (5th Cir. 2002)).

The Second Circuit further noted that, under the plain language of § 1610(a), property of a foreign state is only susceptible to execution if it is *currently being used by the foreign state itself* for a "commercial activity." *Id.* at 18a-19a. Thus, the mere possibility that the property "'could potentially be used'" at some other time for such activities does not suffice to bring foreign state property within the "used for a commercial activity" exception in § 1610(a). *Id.* The prior actions of private corporations with respect to such property are "irrelevant" to this "inquiry." *Id.* at 20a.

Here, the record showed that the funds of Argentine pensioners had never been "used" for a "commercial activity" by the Republic or ANSES. It followed that the funds in question were not susceptible to attachment or execution under § 1610(a):

> Because the order attaching the assets of [ANSES] became effective immediately upon the passage of legislation transferring the assets from the private corporations to [ANSES], neither [ANSES] nor the Republic had the opportunity to use the funds for any commercial activity whatsoever. The only activity that the Republic had engaged in with regard to the funds at the time that the district court confirmed the Orders was the adoption of a law [the Pension Unification Law] transferring legal control of the funds

> from the private corporations to [ANSES]. As we read "used for a commercial activity," we hold that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity." A contrary conclusion would essentially nullify the [FSIA's] commercial activity requirement in cases involving attachment and execution of a foreign state's property.

Id. at 20a.

Accordingly, the Second Circuit concluded that these funds remained immune from attachment – regardless of whether ANSES was to be viewed as separate from the Republic. *Id.* This holding obviated the need to consider ANSES's and the Republic's other arguments in favor of vacatur. *Id.* at 21a-22a; *see also supra* p. 11 n.4, p. 13 n.5. The district court's December 11, 2008 Order and all other related Orders were therefore vacated. Pet. App. at 22a.

Petitioners thereafter moved for panel rehearing and rehearing *en banc*. On November 11, 2009, the panel denied Petitioners' request for panel rehearing. On November 23, 2009, request for a rehearing *en banc* was also denied. *Id.* at 69a. The Second Circuit's mandate has been stayed pending determination of this Petition. *Id.* at 72a.

REASONS FOR DENYING THE PETITION

The Petition should be denied first because it predominantly seeks to overturn *fact-based determinations* of the Second Circuit that are not a proper subject matter for certiorari. The fact-bound nature of the Petition is readily apparent from its repeated claims that the Second Circuit's factual analysis regarding the effect of the Orders and the use of the Funds during the pendency of the Orders was "erroneous." As but one example, Petitioners' contention that the Funds had not been effectively "frozen" as of the date of the December 11, 2008 Order is a straightforward (and untenable) challenge to the Second Circuit's factual characterization of the Orders, not a challenge to its legal analysis. This is not a suitable issue for certiorari review.

The sole *legal* conclusion reached by the Second Circuit – namely, "that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity,'" Pet. App. at 20a – presents no conflict with any circuit authority or this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 407 (1992). *Weltover* held that when a state engages in "garden-variety" market conduct, it engages in "commercial activity" and thus becomes susceptible to the *jurisdiction to be sued* in United States courts under § 1605(a)(2) of the FSIA, regardless of the "motive" or "purpose" underlying such activity. *Weltover*, 504 U.S. at 614. *Weltover* did not involve attempted *execution* against foreign state property pursuant to the narrower "used for" standard of § 1610, nor did it consider

whether a sovereign entity that receives legal or managerial control over an asset should be deemed, without more, to have used the asset for a commercial activity, much less hold this to be the case. Because the Second Circuit's decision presents no conflict with either *Weltover* or any circuit decision addressing § 1610, certiorari is inappropriate.

This case does not, as Petitioners claim, present issues that are "certain to recur in a broad variety of contexts under the FSIA," Pet. at 26, nor does it create "substantial uncertainty" about the scope of sovereign immunity, *id.* at 3, or, least of all, "profoundly affect[]" United States foreign relations. EM/NML Br. at 7. On the contrary, it involves a narrow holding, on peculiar facts unlikely to be repeated, involving statutory provisions – 28 U.S.C. §§ 1609-10 – whose meaning is clear and as to which there is no circuit split. The Petition should be denied.

I. THE SECOND CIRCUIT'S FACT-SPECIFIC HOLDING THAT THE FROZEN FUNDS HAD NOT BEEN PUT TO ANY "USE," MUCH LESS COMMERCIAL USE BY ANSES, DOES NOT PRESENT AN APPROPRIATE ISSUE FOR CERTIORARI, AND WAS IN ANY EVENT PLAINLY CORRECT

The Second Circuit's vacatur of the December 11, 2008 Order and all related Orders characterized these Orders as having "frozen" the Funds so that, when the Pension Unification Law was enacted, ANSES was deprived of any "opportunity to use the funds for any commercial activity whatsoever." Pet. App. at 20a. The

court of appeals further determined that, prior to the Law's enactment, the funds were indisputably in the hands of private entities. *Id.* It followed, again as a purely factual matter, that the only "use" to which the Republic had put the funds was to enact a law transferring "legal control" of the funds to ANSES. *Id.* Based on these fact-specific holdings based on undisputed facts, it necessarily followed that the assets had not been "used" for a commercial activity by ANSES or the Republic. *Id.*

Petitioners maintain that these characterizations of the factual record were "erroneous." Pet. at 13, 21-22. In their place, Petitioners advance a fanciful alternative factual thesis, contending that: (1) rather than "freezing" the Funds, the Orders issued in October and November of 2008 left ANSES free to "adopt[] the same investment 'use' of the [Funds] as the [AFJPs] that previously held the accounts," *Pet.* at iii; *see also id.* at 19-20; and (2) in the "months that followed" the enactment of the Pension Unification Law on December 9, 2008, *id.* at 2, ANSES and/or the Republic unilaterally "decided," *id.* at 21, that the Funds should be "maintained on [their] behalf by third-party financial institutions in the United States," *id.* at 3, thus preserving "the same 'use' of the [Funds]. . . as the [AFJPs]." *Id.* at 21; *see also id.* at 20-21.[6] Upon these

6. Petitioners also claim the district court "found" that, after passage of the Pension Unification Law on December 9, 2008, ANSES "assumed unfettered discretion and control to use the [Funds]." Pet. at 10. The district court's opinion does not contain any such "finding." The cited passages from the district court's opinion merely set forth the district court's views

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alternative factual characterizations – some of which were not advanced below until *after* the Second Circuit's October 15, 2009 opinion – Petitioners now claim that the Funds actually were "used for a commercial activity" by ANSES and/or the Republic and remain subject to such "use" today.

Supreme Court Rule 10 states that "a petition for a writ of certiorari will be granted only for compelling reasons" and "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Even if Petitioners' erroneous factual contentions had merit, this principle warrants denial of the Petition.

A. The Second Circuit's Factual Conclusion that the Orders Had Effectively "Frozen" the Funds Was Plainly Correct

Petitioners challenge as "erroneous" the Second Circuit's fact-specific conclusion that the Funds were "attached" by the Orders issued by the district court in October and November of 2008. Pet. at 12. This flies in the face of the record and common sense. The record shows that from October 28, 2008, onwards, the Funds were subjected to a veritable barrage of pre- and post-judgment attachments and restraints in "72 actions,"

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on ANSES's *past* performance as manager of its own funds, *see* Pet. App. at 36a-38a, as well as the its subjective views on ANSES's relationship with the Republic, *id.* at 48a-49a, and its belief that the funds as managed by the private AFJPs had been held for investment purposes, *id* at 53a.

Pet. App. at 8a, starting with the restraining orders obtained by Petitioners pursuant to Rule 5222 of the New York Civil Practice Law and Rules ("N.Y. C.P.L.R."), followed by the "restraining orders and attachments" obtained by other bondholders. *Id* at 8a. These included post-judgment restraints and pre-judgment attachments obtained by EM and NML pursuant to N.Y. C.P.L.R. §§ 5222 and 6201,[7] as well as an order obtained by GMO that authorized it to deliver to the U.S. Marshals service "Writs of Execution pursuant to Fed. R. Civ. P. 64 and 69, N.Y. C.P.L.R. 5232, 5225, 5227 and 28." This broadside of "freezes," "attachments" and "restraints" purportedly issued pursuant to the execution provision of the FSIA, 28 U.S.C. § 1610(a), barred, first the AFJPs and then ANSES, from doing

7. Petitioners claim that the "attachments" obtained by EM and NML were not actually "attachments," Pet. at 11, but rather "served only to restrain the [Funds] from being removed from the United States pending authorization from the District Court to attach or execute upon the [Funds] under the FSIA, while permitting those assets to continue to be actively traded by the Republic" after the enactment of the Pension Unification Law. *Id* (emphasis removed); *see also id* at 19-20 n.8. However, the record is barren of *any* suggestion that ANSES actually *did* manage or trade these assets in the United States. This is not surprising, as ANSES lacked legal power to hold or manage investments abroad after the passage of the Pension Unification Law. Moreover, speculation as to what ANSES "could" have done is untenable in the face of the attachments obtained by NML, which on their face, were just that: pre- and post-judgment "attachments" – a fact which NML itself readily acknowledges in its own submission in support of certiorari review. EM/NML Br. at 2 n.1 ("Petitioner's assertion that NML neither obtained an attachment order nor levied on the subject property is incorrect." (citation omitted)).

the *only* thing that Argentine law allowed and demanded, namely that the assets be repatriated in kind to Argentina for management by ANSES there. Certain of the Orders obtained by EM and NML took effect immediately upon passage of the Pension Unification Law on December 9, 2008. Pet. App. at 19a.[8] Once the law took effect, "NML and EM delivered writs of execution." EM/NML Br. at 6 n.2. The Second Circuit's characterization of the Orders issued in October and November of 2008 as "restraining orders and attachments," Pet. App. at 8a, is therefore unassailable.

Petitioners argue that the Second Circuit, rather than treat the Orders as "attachments" for purposes of §§ 1609-11, should have recognized an implied power of district courts "to prevent the foreign state from removing, or otherwise altering the use of," property in the United States, pending a determination whether an FSIA exception to immunity from attachment applies to such property. Pet. at 25. Petitioners quibble that the December 11, 2008 Order should not have been characterized as an "attachment," but should have been regarded merely a "narrowly-tailored restraining order[]," issued under the so-called "inherent" jurisdiction of the district court pursuant to the All Writs Act, 28 U.S.C. § 1651, pending a *future* determination

8. According to Petitioners, "[t]he Court of Appeals' conclusion that 'the order attaching the assets of the Administration was effective immediately upon transfer' presupposes a contested issue of New York law that is currently *sub judice* before the District Court." Pet. at 19 n.5. Even were Petitioners correct, this alone would support denial of the Petition, as it would require the Court to resolve disputed state law issues.

whether the Funds indeed were subject to attachment under the FSIA. Pet. at 14, 24, 26. The notion that sovereign property can be restrained outside the narrow confines of the FSIA pending some future determination whether future events would warrant future attachment is squarely foreclosed by § 1609's general restriction on "attachment arrest and execution" of foreign state property and the universally broad reading courts have given to § 1609. *See, e.g., Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1230 (2d Cir. 1995); *Alejandre v. Telefonica Larga Distancia, de P.R., Inc.*, 183 F.3d 1277, 1283 (11th Cir. 1999); *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1983) ("The FSIA would become meaningless if courts could eviscerate its protections merely by denominating their restraints as injunctions against the negotiation or use of property rather than as attachments of that property.").[9] This is not a "procedural catch-22," as Petitioners claim, Pet. at 27, but the result of Congress's considered legislative decision to constrain the ability of parties to levy execution on sovereign assets. Petitioners' lament that there should be a better way for creditors to attach the immune assets of a foreign sovereign should be addressed to Congress, not the judiciary.

9. Predictably, the cases cited by Petitioners regarding district courts' general power to "prevent removal of assets from the United States when that would frustrate a court's ability to enforce its judgment," Pet. at 26, *did not involve FSIA issues.* Likewise, the All Writs Act itself, 28 U.S.C. § 1651(a), does not purport to derogate from foreign sovereign immunity. *See In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 545 n.9 (9th Cir. 1996) (vacating injunction against foreign state's property: "the All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute" (citation omitted)).

It is sheer folly to suggest that, as of December 9, 2008, "no 'attachment' or levy of the [Funds] had occurred," *id.* at 16, when the record is so squarely to the contrary. The Funds were improvidently frozen while being managed by indisputably private parties in October 2008, and the Second Circuit's conclusion that the Funds were also frozen as of and from the enactment of the Argentine Pension Unification Law on December 9, 2008, thus is plainly correct.

B. The Second Circuit's Conclusion that ANSES Was Deprived of Any Opportunity to "Use" the Funds for "Any Activity Whatsoever" Was Correct

Petitioners also challenge as "erroneous" the finding of the Second Circuit that the only "use" to which the Funds had been put by the Argentine legislature was "the adoption of a law transferring legal control of the [Funds] from [the AFJPs] to [ANSES]." Pet. App. at 20a. Instead, they remarkably claim, that ANSES elected to "adopt" the AJFPs' past investment practices with respect to the Funds. Pet. at 12, 21.[10]

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10. Petitioners do not challenge the general principle that § 1610(a) looks to "is how the *foreign state* uses the property, not how private parties may have used the property in the past." *Conn Bank of Commerce v Republic of Congo*, 309 F.3d 240, 256 n.5 (5th Cir. 2002) (emphasis in original); Pet. App. at 20a. Thus, they concede, the AFJPs' past investment practices are irrelevant. The supposition that ANSES affirmatively "elected" to maintain the investments in the United States according to those past practices finds not a shred of record support.

Even had this argument been preserved,[11] it "admittedly raises a question of first impression about the effects of the language of a particular foreign law," EM/NML Br. at 4, together with intertwined factual issues, none of which is appropriate for certiorari.

In all events, Petitioners' assertion finds not a scintilla of record support. The record shows that (1) the Pension Unification Law required the Funds to be repatriated to Argentina and absorbed into the Guarantee Fund by ANSES – a legislative mandate that incontestably was not implemented because of the Orders, Pet. App. at 10a, 20a; and (2) by statute, ANSES, which has no presence in the United States, was only authorized to invest in Argentine domestic securities, *id.* at 10a, meaning that as a matter of Argentine law, ANSES could never have "chosen," and in fact did not choose, to manage funds that remained in the United States. It was Petitioners themselves that obtained the restraints freezing the funds in the United States. This is not a "choice" that can be foisted on ANSES on the Petitioners' say-so.

11. Petitioners raised these new factual arguments for the first time in their motions for panel and *en banc* rehearing, making them inappropriate for consideration by this Court. *See Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (consideration of issues was precluded where party raised it "for the first time in his response to petitioners' motion for rehearing in the Court of Appeals"); *see also United States v. United Foods, Inc.*, 533 U.S. 405, 417 (2001) (petitioner should not "assert new substantive arguments. . . when those arguments were not pressed in the court whose opinion we are reviewing, or at least passed upon by it").

Petitioners thus bootstrap their own successful efforts to freeze the funds into a claim that ANSES "cho[se]," to be a passive investor during the pendency of the Orders, electing "not to actively trade" the Funds "and simply *hold* [them]." Pet. at 21. Not surprisingly, Petitioners offered neither below nor here a single affirmative act by ANSES demonstrating any such election. Neither ANSES nor the Republic had any "choice" in the matter: the Orders Petitioners themselves obtained froze the Funds in the United States. Had the Orders not been in place, the funds would have been repatriated by the AFJPs to Argentina in fulfillment of the Pension Unification Law likely even before its enactment, as Petitioners themselves understood when they rushed into the district court in October of 2008 to freeze the funds in the United States based merely on the announcement that the Pension Unification Law would be enacted in the future. This was a situation entirely of the Petitioners' (and the district court's) making, and was strenuously opposed at every turn by ANSES and the Republic. In no sense could either of them be said to be "choosing" this state of affairs.[12] The Second Circuit's conclusion that ANSES had been deprived of the "opportunity to use the funds for any commercial activity whatsoever," Pet. App. at 20a, was thus more than just factually correct; it was stating the obvious.

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12. Petitioners are therefore incorrect in saying that the Pension Unification Law "directed" that the Funds be put to the same use as the AFJPs had put them. Pet. at 21. On the contrary, the law explicitly barred ANSES from investing outside of Argentina and mandated that the funds be repatriated and be administered by ANSES "in Argentina." Pet. App. at 10a; *see supra* p. 10.

II. THE SECOND CIRCUIT'S HOLDING DOES NOT CONFLICT WITH THE LAW OF ANOTHER CIRCUIT OR ANY OTHER AUTHORITY

Having held that the only relevant "use" to which the Funds had been put was the enactment of the Pension Unification Law transferring "legal control" of the Funds (but, certainly as to those funds located in the United States and by then already frozen, not actual control of them), the Second Circuit went on correctly to conclude that "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for commercial activity'" for purposes of the FSIA's attachment regime in § 1610(a). *Id.* at 20a.

Petitioners do not claim that this holding under § 1610(a) is subject to any circuit split, nor does the holding conflict with this Court's decision in *Weltover*, a case that, as noted, did not even involve § 1610. In that case, this Court held that the Republic's sale of commercial bonds fell within the "commercial activity" exception to *jurisdiction* contained in § 1605(a)(2) of the FSIA, thus subjecting the Republic to private lawsuits in the courts of the United States by bondholders seeking to enforce those "garden-variety debt instruments." *See Weltover*, 504 U.S. at 607-08. In so holding, this Court noted that

> when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are "commercial" within the meaning of the FSIA. Moreover, because

> the Act provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose," 28 U. S. C. § 1603(d), the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in "trade and traffic or commerce."

Id. at 614 (citation omitted).

Nothing in the court of appeals' opinion is at odds with *Weltover*, or even involves the jurisdictional issue addressed in that holding. On the contrary, the court of appeals' holding that "the . . . transfer to a governmental entity of legal control over an asset" is a sovereign, non-commercial "use" for purposes of the execution standard in § 1610(a) – which is different and narrower than the jurisdictional standard in § 1605(a)(2) – is in total harmony with *Weltover* and the many other decisions that have correctly distinguished between the strict execution preconditions of § 1610 and the broader jurisdictional reach of § 1605.[13] Moreover, unlike the

13. *See Af-Cap v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1087 (9th Cir. 2007) ("[T]he phrase 'used for' in § 1610(a) is not a mere syntactical infelicity that permits courts to look beyond the 'use' of property, and instead try to find any kind of nexus or connection to a commercial activity in the United States."); *id.* at 1090 ("[I]f Congress had intended to equate 'used for' with 'integral to' or 'related to,' Congress likely would have used the phrase 'in connection with,' as it did in § 1605."); *Conn. Bank of Commerce*, 309 F.3d at 255.

examples of commercial activity provided by *Weltover* (*e.g.*, "a contract to buy army boots," *see Weltover*, 504 U.S. at 614-15), a legislative enactment transferring legal or administrative control over mandatory social security contributions to a governmental entity (such as ANSES) is the type of act *only a sovereign could perform.* Put simply, "such authoritative control" of mandatory social security contributions "cannot be exercised by a private party." *Id.* at 614.

Not only is this conclusion fully consonant with *Weltover*, it finds unanimous support in circuit case law,[14] as well as the structure and differing language of §§ 1605 and 1610, whose "expropriation exceptions" to jurisdiction and execution are distinct from the "commercial activities" exceptions, *see* §§ 1605(a)(3) and 1610(a)(3), thus reinforcing that the assertion of sovereign control or ownership over a particular asset is a sovereign, non-commercial activity for purposes of the FSIA.[15]

14. *See Rong v. Liaoning Province Gov't*, 452 F.3d 883, 889 (D.C. Cir. 2006) (Chinese province's statutory takeover of an automobile company was sovereign, rather than commercial); *Garb v. Republic of Poland*, 440 F.3d 579, 586 (2d Cir. 2006) ("Expropriation is a decidedly sovereign – rather than commercial – activity."); *Beg v. Islamic Republic of Pak.*, 353 F.3d 1323, 1326 (11th Cir. 2003) ("Confiscation of real property is a public act because private actors are not allowed to engage in 'takings' in the manner that governments are."); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 254 (7th Cir. 1983) (nationalization of property is a "quintessential [g]overnment act").

15. Petitioners' stubborn reliance upon cases concerning the FSIA's "expropriation exception" to *jurisdictional*

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The Second Circuit's decision is not affected by the decisions cited by Petitioners – *not* involving the transfer of statutory control over an asset, and involving *jurisdiction rather than execution* – in which courts were willing to find that a sovereign had engaged in "commercial activity" with respect to that asset. The decisions cited by Petitioners, *see* Pet. at 18-19, merely serve to illustrate *Weltover*'s statement that "garden-variety" market activities are likely to fall within

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immunity is misplaced, as it has no bearing on the *execution* question here. This jurisdictional exception allows suit where (*inter alia*) nationalized property is "owned or operated" by foreign sovereign agencies or instrumentalities "engaged in a commercial activity in the United States." 28 U.S.C. § 1605(a)(3). Those cases held that the "owned or operated" limb of this exception was satisfied regardless of whether the sovereign entity was affirmatively "using" or "benefiting" from the seized property. *See Nemariam v. Fed Democratic Republic of Eth.*, 491 F.3d 470, 480 (D.C. Cir. 2007) (holding that "[t]he phrase 'owned or operated' [contained within § 1605(a)(3)] plainly does not include a benefit requirement"); *Alperin v Vatican Bank*, No. C-99-04941 MMC, 2007 U.S. Dist. LEXIS 95529, at *28 n.8 (N.D. Cal. Dec. 27, 2007) (examining, in context of claims by plaintiffs that the wartime Croatian regime had transferred looted property to Vatican, whether Vatican Institute of Religious Work's alleged receipt of that property would satisfy § 1603(3)'s "takings" requirement, absent a showing that the Institute of Religious Work "benefited" from use of that property). By contrast, whatever the basis for *jurisdiction* under § 1605, § 1610(a) explicitly requires for purposes of *execution* a showing of commercial "use," which could not be made here.

§ 1605(a)(2)'s "commercial activity" exception to jurisdiction – an issue not raised by this case.[16]

Finally, Petitioners' speculation that a foreign state's continued holding of United States investment accounts might be tantamount to "use" of such accounts for a "commercial activity" for purposes of § 1610(a) is beside the point, because, as the Second Circuit correctly found, no such use occurred here. Accordingly, Petitioners have failed to identify any inconsistency with *Weltover*.

16. *See Globe Nuclear Servs & Supply, Ltd. v. AO Techsnabexport*, 376 F.3d 282, 289 (4th Cir. 2004) (§ 1605(a)(2) satisfied because "[t]he entrance into a contract to supply a private party with uranium hexafluoride is the very type of action by which private parties engage in 'trade and traffic or commerce'"); *Rush-Presbyterian-St Luke's Med. Ctr v Hellenic Republic*, 877 F.2d 574, 580-81 (7th Cir. 1989) (Greek government's contract with two doctors and a U.S. organ bank providing for performance of kidney transplants for an agreed amount was "commercial activity"); *Tex Trading & Milling Corp v Fed. Republic of Nig* , 647 F.2d 300, 309 (2d Cir. 1981) (Nigerian government's purchase of cement was "commercial activity" because "the activity [was] one in which a private person could engage"); *Wasserstein Perella Emerging Mkts Fin., L.P v. Province of Formosa*, No. 97 Civ. 793 (BSJ), 2000 U.S. Dist. LEXIS 6416, at *27 (S.D.N.Y. May 9, 2000) ("The Province does not deny that borrowing money and hiring investment banks are inherently commercial activities.").

III. THE STATUTORILY-MANDATED REPATRIATION OF THE FUNDS TO ARGENTINA IS NOT A "COMMERCIAL ACTIVITY"

Petitioners artfully claim that for the Funds to be repatriated to Argentina in conformity with Article 8 of the Pension Unification Law, they would need to be "liquidate[d] and transfer[red] out of the investment accounts" in the United States, a process which supposedly would be a commercial "use" of the Funds for purposes of *Weltover*. Pet. at 22-23. This contrived proposition is unconnected to *Weltover* and, like their previous argument, bootstraps on Petitioners' own improvident effort to freeze the funds in the United States.

Weltover did not address whether the fulfillment of a foreign statute's mandate that social security funds in the United States be repatriated to a specialist foreign government agency should be characterized as commercial "use" of such funds for execution purposes under § 1610(a)(1), much less made such a holding.[17] By contrast, circuit court authority unanimously holds that repatriation of assets is a sovereign, non-commercial activity.

17. None of the other decisions Petitioners cite, Pet. at 23, involved repatriation of assets. *See Libancell S A L v Republic of Leb* , No. 06 Civ. 2765 (HB), 2006 U.S. Dist. LEXIS 29442, at *10-13 (S.D.N.Y. May 16, 2006) (noting in dicta that the "proceeds of a potential debt offering" might satisfy § 1610(a)'s "commercial use" exception, but holding that Lebanon had not waived immunity from execution over such assets); *Daventree Ltd. v. Republic of Azerbaijan*, 349 F. Supp. 2d 736, 750 (S.D.N.Y. 2004) (addressing Azeri government's implementation of a "privatization" program regarding its state-owned oil company), *opinion clarified*, No. 02 Civ. 6356, 2005 WL 2585227 (S.D.N.Y. Oct. 13, 2005).

See Ministry of Defense & Support for Armed Forces of Islamic Republic of Iran v. Cubic Defense Sys., Inc., 495 F.3d 1024, 1037 (9th Cir. 2007) (holding that a defense ministry's plan to "send the proceeds [of an arbitration award] back to Iran for assimilation into [its] general budget" was non-commercial for purposes of § 1610(a), "[b]ecause *repatriation into a ministry's budget does not constitute commercial activity*" (emphasis added)), *rev'd on other grounds*, 129 S. Ct. 1732 (2009);[18] *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 546 (9th Cir. 1996) ("a governmental agency of the Philippines is acting under a statutory mandate to recover property allegedly stolen from the treasury"; because this was an exercise of "police power," the commercial-activity exception does not apply"). In none of these cases did the mechanics of repatriation bear on the conclusion that the acts were non-commercial, nor should it bear on it here.

Indeed, the notion that a government, acting in fulfillment of a sovereign enactment, cannot transfer monies from one country to another without necessarily conducting "commercial" activities, would undermine this Court's direction, in *Weltover*, that "a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity," *Weltover*, 504 U.S. at 614, because the implementation of such regulations invariably involves

18. This Court's later reversal of the Ninth Circuit's decision related solely to the issue whether the funds were "blocked funds" for purposes of the Terrorism Risk Insurance Act of 2002, 28 U.S.C.A. § 1610 note; *see Ministry of Def. & Support for Armed Forces of Islamic Republic of Iran v. Elahi*, 129 S. Ct. 1732, 1745 (2009), and therefore did not affect the Ninth Circuit's earlier holding that repatriation of funds was a sovereign, non-commercial activity for purposes of § 1610(a).

the transfer and repatriation of assets from overseas bank accounts into the home country.

Above all, Petitioners pay no heed to what *Weltover* defines as the "nature" of a sovereign activity, *i.e.*, "the outward form of the conduct that the foreign state performs or agrees to perform." *Id.* at 617. Here, the "outward form" of the proposed repatriation is that it is part of a national law placing all Argentine social security funds under one administrator, ANSES. Since the transfer of "legal control" under this law was correctly held to be a sovereign activity, incidental activities necessary for the fulfillment of that transfer (such as repatriation) are likewise sovereign in nature.

IV. THE COURT SHOULD DENY THE PETITION BECAUSE THERE EXIST MULTIPLE ALTERNATIVE GROUNDS FOR AFFIRMANCE

Where "there [are] other legal grounds for affirmance that demonstrate that the decision below is correct regardless of how the Court resolves the questions presented," a grant of certiorari is ill-advised. Eugene Gressman et al., *Supreme Court Practice* 504 (9th ed. 2007). The Court should therefore deny the Petition based upon the many alternative grounds for affirmance properly raised before, but found unnecessary to reach by the court of appeals.[19]

19. *See supra* p. 11 n.4, p. 13 n.5.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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